

NO. 49375-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ALLRED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it admitted over defense objection generalized testimony regarding delayed disclosure by victims of sexual abuse.

Issue pertaining to assignments of error

Over defense objection, the State presented expert testimony regarding delayed disclosure by child victims of sexual abuse. Where this testimony was expressed in terms of generalizations as to sexually abused children as a class did the expert testimony unfairly bolster the testimony of the complaining witness, prejudicing the defense?

B. STATEMENT OF THE CASE

1. Procedural History

The Clark County Prosecuting Attorney charged appellant Christopher Allred with second degree rape, two counts of first degree incest, and one count of second degree incest, alleging the crimes were committed against a family or household member by use of a position of trust. CP 5-7; RCW 9A.44.050(1)(a); RCW 9A.64.020(1), (2); RCW 10.99.020; RCW 9.94A.535(3)(n). The case proceeded to jury trial before the Honorable Scott Collier, and the jury returned guilty verdicts and affirmative special verdicts. CP 121-29. The court imposed standard

range sentences and mandatory legal financial obligations. CP 140-43. Allred filed this timely appeal. CP 130.

2. Substantive Facts

In March 2015, 19-year-old AA was living with and being homeschooled by her parents. RP 125-26. She was not doing well in school, had been held back twice, and was not on track to graduate. RP 126, 133-34, 164-65. Her parents were charging her rent, which they would forgive if she kept her grades up, but her grades did not improve. RP 146, 171-72. AA's father, Christopher Allred¹, made the decisions about her grades and schoolwork, and she resented him for not allowing her to graduate and imposing conditions on her. RP 166, 168, 243. On March 16, 2015, AA's rent was due, but she had no money to pay it, no job, and nowhere to go if her parents kicked her out. She was feeling frustrated with the number of school assignments she had to complete and her punishment for not doing so. RP 146, 173-76, 203, 210, 265. Under these circumstances she decided to leave home. RP 147, 210.

AA walked to a nearby library and started trying to contact friends on Facebook. RP 147. She reached Jessica Davis, the older sister of her best friend, telling her she was in trouble and had run away. RP 85, 147. Davis met AA at the library, and they talked for a while about what Davis

¹ Allred adopted AA when she was a child. RP 260.

considered normal teen angst and frustration. RP 85. AA told Davis that that Allred was unhappy with her progress at school and how she was responding to his parental authority. RP 95. Davis had AA call her mother, Kari Allred, to let her know where she was and that she was safe. RP 86. Kari told AA she could come home when she wanted, but she did not offer to come get her. RP 96-97. After that call, AA started making allegations of inappropriate contact by Allred. RP 86. In a second call, Kari was told she needed to come to the library because AA had some things to tell her. RP 94, 265.

When Kari and Allred arrived at the library, Davis informed them of AA's allegations. RP 149. Everyone was upset, but they agreed to go with Davis to talk to her pastor. RP 87-89, 149-50. The pastor was told about the allegations of sexual abuse, and she called the police. RP 90, 113. Allred waited quietly for law enforcement to arrive. RP 90, 100, 113, 285.

Law enforcement officers spoke to AA, Davis, Kari, the pastor, and finally Allred. RP 333. Allred told the deputy who interviewed him that he was aware AA had made allegations of inappropriate touching, and he described the circumstances of her statements. RP 332, 336-38. When the deputy asked him about the specific allegations, Allred denied them. RP 339-40, 363-64.

Allred was not arrested that day. RP 101. AA spent that night with Davis and then moved to Sacramento to live with her grandparents. RP 150.

In course of the investigation AA was interviewed several times. She spoke to a deputy who responded to the pastor's 911 call and to the case detective, she was interviewed by a forensic interviewer, and after charges were filed against Allred she was interviewed by the defense investigator. RP 152-53, 370.

At trial AA testified that Allred started sexually abusing her when she was 16 years old after he caught her looking at pornography. RP 127, 145-46. She said Allred would kiss her, touch her breasts, put his hands in her vagina, put his mouth on her vagina, and put his penis in her mouth. RP 129. She said the first time he put his fingers in her vagina she tried to move away, but he grabbed her arm and told her she was not allowed to. RP 130-31. AA testified that this kind of touching occurred almost weekly for about three years, most of the time in the living room, and her brother would often be sitting on another couch in the same room when it happened. RP 130, 138, 187, 191, 241.

AA testified that one time her mother walked in her room while Allred was touching her breast over her bra, and Allred quickly stopped. RP 142. She said that Allred told her if she said anything to her mother

about it, she would not be allowed to go to a convention she wanted to attend, so she told her mother nothing happened. RP 142. Kari Allred also described this incident at trial. RP 269-72. AA testified that Allred often said that if she told anyone what was happening nobody would believe her. RP 143.

On cross examination, AA admitted that the story she told in her trial testimony was different than any of the stories she had told previously. RP 225. Many of the allegations she testified to were made for the first time at trial. RP 215-25. She said that she was nervous while testifying because she did not want people to think she was making things up. RP 239.

Monica Hernandez, a police detective with the Children's Justice Center in Vancouver, testified that she was assigned to this case. RP 370. Hernandez testified that she has investigated close to 200 cases like this, and she was not surprised that the alleged abuse happened with other people in the room. RP 372. The prosecutor started to ask her about other cases, but defense counsel objected that generalized information was not relevant and it was inappropriate to compare this case to other cases. RP 372-73.

The court directed the prosecutor to rephrase the question, and the prosecutor asked Hernandez what delayed disclosure is. RP 373.

Hernandez responded that delayed disclosure is when an individual discloses information and then later discloses more information after starting to feel more comfortable and being believed. RP 373. She continued, “Typically kids who are told that, ‘No one’s ever going to believe you,’ or threatened or – there’s a number of circumstances that, that come about where kids are – have a delayed disclosure or they – they’ll disclose a partial incident and then come out with more.” RP 373.

Defense counsel objected again, reiterating that this general information about things Hernandez was taught happens was not relevant or appropriate. RP 374. The court noted that it had told the prosecutor to rephrase, and the prosecutor had done so. But since defense counsel had brought up through cross examination of AA that she had made new allegations as time went by, Hernandez could testify based on her training that that was not an uncommon scenario. RP 374.

Defense counsel addressed the testimony about delayed disclosure in closing argument, saying AA’s allegations were not delayed reports because she said these things were ongoing at the time of her allegations. But at every step of the process her story had changed. RP 481-82. The prosecutor responded in rebuttal argument that delayed disclosure does not only include disclosures that are delayed but disclosures that are made

when a person like AA starts disclosing abuse and gets better at talking about it and can start talking more. RP 492-93.

C. ARGUMENT

ADMISSION OF GENERALIZED TESTIMONY REGARDING DELAYED DISCLOSURE UNFAIRLY BOLSTERED AA'S TESTIMONY AND PREJUDICED THE DEFENSE.

An expert may express an opinion concerning his or her field of expertise if the opinion will aid the jury. ER 702; State v. Montgomery, 163 Wn.2d 577, 590, 813 P.3d 267 (2008). A witness offering an opinion under ER 702 must be qualified as an expert, and any opinion testimony, must be based on a theory generally accepted in the scientific community. State v. Jones, 71 Wn. App. 798, 814, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

Once a witness's credibility is challenged, the trial court may allow expert testimony which tends to corroborate the witness's testimony. State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984), modified on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). While limited testimony that delayed disclosure is not unusual is generally permissible for this purpose, it has long been recognized that expert testimony which crosses the line into generalized profile evidence is not admissible. See Jones, 71 Wn. App. at 818.

In Jones, the defendant charged with child molestation and rape of a child challenged expert testimony presented by the State. The social worker who had worked with the victim testified that she had worked with 300 to 400 children. In addition to giving her opinion that the child had been sexually abused by the defendant, which was clearly error, the social worker testified about the victim's sexual acting out and night terrors and said that such behaviors were very common in sexually abused children. Admission of this testimony was challenged on appeal. Jones, 71 Wn. App. at 813-14.

The Court of Appeals recognized that there is a distinction “between a caseworker narrowly testifying to the behavior of abused children seen in a specific practice and more generalized assertions as to the behavior of abused children as a class.” Id. at 817. Generalized statements about the behavior of sexually abused children as a class cross over into scientific testimony regarding profile or syndrome and are inappropriate to prove the existence of abuse or that the defendant is guilty. Such testimony may only be offered to rebut an inference that certain behaviors are inconsistent with abuse. Id. at 818-19.

Here, the defense challenged AA's credibility by demonstrating that she had told different stories each time she spoke of her allegations. RP 225. Thus, limited testimony from Hernandez that, from her

observations, delayed disclosure is not unusual, would be appropriate. She did not limit her testimony to her observations from viewing interviews as a detective assigned to the Children's Justice Center, however. Instead, as defense counsel argued, she inappropriately included generalized assertions about what typically happens when abused children are told no one will believe them. This testimony regarding sexually abused children as a class was inadmissible and should have been excluded based on defense counsel's objection.

Admission of this profile testimony was highly prejudicial. The defense was that the events alleged by AA never happened. The defense established that AA had motive to fabricate, that the circumstances under which the alleged acts were claimed to have occurred made the allegations questionable, and that AA told a different story every time she spoke about them, with many significant details being told for the first time at trial. Expert testimony giving the impression that the very facts that the defense used to challenge AA's credibility instead fit a profile of someone telling the truth about sexual abuse allegations unfairly bolstered AA's testimony and prejudiced the defense. Allred's convictions must be reversed.

D. CONCLUSION

For the reasons addressed above Allred's convictions must be reversed and the case remanded for a new trial.

DATED April 21, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski".

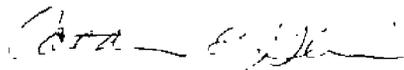
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Certification of Service by Mail

Today I caused to be mailed a copy of the Brief of Appellant in
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Christopher Allred DOC# 392466
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Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
April 21, 2017

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